KETUA PENGARAH HASIL DALAM NEGERI

v.

MALAYSIAN CO-OPERATIVE INSURANCE SOCIETY LTD

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
ABDUL MALEK AHMAD JCA
DENIS ONG JCA
[CIVIL APPEAL NO: W-01-145-96]
18 DECEMBER 1999

REVENUE LAW: *Income tax - Exempt income - Construction of statutory provision removing exemption - Income Tax Act 1967*

STATUTORY INTERPRETATION: *Construction of statutes - Ambiguity - Removal of existing right to exemption from income tax - Approach courts take*

The respondent, a co-operative society registered in 1954, appealed to the Special Commissioners of Income Tax ('the Special Commissioners') in respect of a notice of assessment for the year of assessment 1986. Under the Income Tax Ordinance 1947 ('the Ordinance') and the various repealing and amending Acts subsequent to it, the respondent's income was exempt from tax up to the year of assessment 1976. The appellant issued the notice of assessment relying on amendments to the Income Tax Act 1967 ('the Act') made by Act A471 and Act A380.

The Special Commissioners made an order, *inter alia*, that the respondent was not exempted from paying income tax for the year of assessment 1986 but could bring forward any adjusted losses and capital allowances irrespective of whether those years were within or outside the period of exemption, to determine the amount of chargeable income.

The appellant appealed against the latter part of the order, while the respondent appealed against the former part.

The High Court judge held that the respondent continued to enjoy exemption from income tax even though the Ordinance had been repealed and replaced by the Act by virtue of the transitional provision of s. 156 read with para 33 of sch 9 of the Act. The High Court allowed the respondent's appeal on the basis that the proviso purportedly withdrawing the exemption was ambigious and left room for doubt. The court also

affirmed the order of the Special Commissioners allowing the carrying forward of the adjusted losses and capital allowances, based on ss. 42(b), 43(2), 44(2) and 127(5) of the Act read with para 75 of sch 3 to the Act.

The appellant appealed.

Held:
Per Abdul Malek Ahmad JCA

[1] This appeal was on all fours with the case of *National Land Finance Co-operative Society Ltd. v. Director General of Inland Revenue* which reiterated the principle that the courts have refused to adopt a construction of a taxing Act which would impose liability when doubts exist.

[2] Where there is doubt as to whether the Legislature intends to impair an existing right of a taxpayer and inflict a detriment by taking away a vested right to exemption from tax, and where the exemption has not been removed by sufficiently clear words, the ambiguity has to be construed in favour of the taxpayer.

[Appeal dismissed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Responden, sebuah syarikat kerjasama (koperasi) yang didaftarkan dalam tahun 1954, telah merayu kepada Pesuruhjaya-Pesuruhjaya Khas Cukai Pendapatan ('Pesuruhjaya-Pesuruhjaya Khas tersebut') berhubung dengan sebuah notis taksiran bagi tahun taksiran 1986. Di bawah Ordinan Cukai Pendapatan 1947 ('Ordinan tersebut') dan pelbagai Akta-Akta pemansuhan dan pindaan yang berikutan dengannya, pendapatan responden telah dikecualikan daripada cukai setakat tahun taksiran 1976. Perayu telah mengeluarkan notis taksiran dengan bergantung kepada pindaan-pindaan kepada Akta Cukai Pendapatan 1967 ('Akta tersebut') yang dibuat melalui Akta A471 dan Akta A380.

Pesuruhjaya-Pesuruhjaya Khas tersebut telah membuat satu perintah, *antara lainnya*, bahawa responden tidak dikecualikan daripada membayar cukai pendapatan bagi tahun taksiran 1986 tetapi boleh membawa ke hadapan sebarang kerugian terlaras dan ekaun-elaun modal tidak kira samada tahun-tahun tersebut terletak di dalam ataupun di luar tempoh pengecualian, demi menentukan jumlah pendapatan tercukai.

Perayu telah membuat rayuan terhadap bahagian perintah yang kemudiannya, sedangkan responden pula merayu terhadap bahagian yang terdahulunya.

Tuan hakim Mahkamah Tinggi telah memutuskan bahawa responden terus menikmati pengecualian daripada cukai pendapatan meskipun Ordinan tersebut telah dimansuhkan dan digantikan oleh Akta tersebut menurut peruntukan peralihan s. 156 yang dibaca bersama dengan para 33 Jadual 9 Akta tersebut. Mahkamah Tinggi telah membenarkan rayuan responden atas dasar bahawa proviso yang dikatakan menarik balik pengecualian tersebut adalah taksa dan agak mencurigakan. Mahkamah juga telah mengesahkan perintah Pesuruhjaya-Pesuruhjaya Khas yang membenarkan kerugian terlaras dan elaun-elaun modal untuk dibawa ke hadapan, berasaskan ss. 42(b), 43(2) ,44(2) dan 127(5) Akta tersebut yang dibaca bersama dengan para 75 Jadual 3 Akta tersebut.

Perayu telah membuat rayuan.

Diputuskan:
Oleh Abdul Malek Ahmad HMR

[1] Rayuan ini adalah seiras dengan kes *National Land Finance Co-operative Society Ltd. lwn. Director General of Inland Revenue* yang mengulangi prinsip bahawa mahkamah-mahkamah telah enggan untuk menerima-pakai sebuah Akta pengenaan cukai yang akan mengenakan tanggungan (liabiliti) apabila terdapat keraguan.

[2] Di mana terdapatnya keraguan mengenai sama ada badan perundangan berniat untuk merosakkan hak seseorang pembayar cukai yang sedia ada dan menyebabkan kerugian dengan merampas hak kukuh terhadap pengecualian daripada cukai, dan di mana pengecualian berkenaan telah tidak dibatalkan dengan perkataan-perkataan yang cukup jelas, ketaksaan (ambiguity) sedemikian perlu ditafsirkan secara memihak kepada pembayar cukai.

[Rayuan ditolak dengan kos.]

Case(s) referred to:
National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue [1993] 4 CLJ 339 ***(foll)***

Legislation referred to:
Finance Act 1991, s. 18
Income Tax Act 1967, ss. 42, 43(2), 44(2), 65A, 127(5), 155, 156, schs 3 para 75, 6 para 12(2), 9 para 33(a)
Income Tax Ordinance 1947, s. 13(1)(f)(ii)

For the appellant - Abu Tariq Jamaluddin
For the respondent - Cyrus V Das (Dr Arjunan Subramaniam & John Mathew with him); M/s Shook Lin & Bok

[Appeal from High Court, Kuala Lumpur; Civil Appeal No: R2-14-5-1994]

Reported by Anne Khoo

JUDGMENT

Abdul Malek Ahmad JCA:

The notice of appeal to the Special Commissioners of Income Tax by the respondent against the appellant dated 26 January 1988 listed the following grounds:

1. That losses incurred in preceding years should be brought into account in determining the Society's chargeable gain or adjusted loss;

2. That unabsorbed capital allowances should be carried forward in the computation of the Society's chargeable gain or adjusted loss; and

3. That the deductions from total income in arriving at chargeable income for a particular year of assessment as provided for in Section 65A(1)(a) and (b) of the Income Tax Act, 1967 (as amended) form part of the unabsorbed losses for preceding years available as a deduction from aggregate income for each year of assessment including year of assessment 1986 and subsequent years of assessment in accordance with Section 43(2) of the Income Tax Act, 1967 (as amended).

Section 65A of the Income Tax Act 1967 (hereinafter "the Act") was introduced by the Income Tax (Amendment) Act 1977 (Act A 380) and had effect for the year of assessment 1977 and subsequent years of assessment. The new s. 65A of the Act then read:

> 65A. (1) In arriving at the chargeable income of a co-operative society for a year of assessment, there shall be deducted from the total income for that year such sum as has been transferred or paid during the basis period for that year to a statutory reserve fund or to any educational institution or any co-operative organisation established for the furtherance of co-operative principles, or to both, or to a Co-operative Education Trust Fund, as may be required under the provisions of any written law relating to the registration of co-operative societies in Malaysia:
>
> Provided that the maximum sum to be deducted shall not exceed one-fourth of the audited net profits for that basis period of such co-operative society.
>
> (2) The provisions of section 3A shall not apply to the income of a co-operative society.

Subsection (1) of the said section was amended again by virtue of the Income Tax (Amendment) Act 1978 (Act A 429) and, having effect for the year of assessment 1978 and subsequent years of assessment, read as follows:

> (1) In arriving at the chargeable income of a co-operative society for a year of assessment, there shall be deducted from the total income for that year:
>
> (a) such sum as has been transferred or paid during the basis period for that year to a statutory reserve fund or to any educational institution or co-operative organisation established for the furtherance of co-operative principles, or to both, or to a Co-operative Education Trust Fund, as may be required under the provisions of any written law relating to the registration of co-operative societies in Malaysia:
>
> Provided that the maximum sum to be deducted shall not exceed one-fourth of the audited net profits for that basis period of such co-operative society; and
>
> (b) an amount equal to six per cent (or such percentage as may be prescribed) of the members' funds (as defined in paragraph 12(2) of Part I of Schedule 6) as at the first day of the basis period for the year of assessment.

Subsequently, pursuant to s. 18 of the Finance Act 1991, (Act 451), the said section was amended by renumbering s. 65A(1) as s. 65A and by deleting sub-s. (2) thereof. This had effect from the year of assessment 1991 and subsequent years of assessment. The existing section now reads:

> 65A. In arriving at the chargeable income of a co-operative society for a year of assessment, there shall be deducted from the total income for that year:
>
> (a) such sum as has been transferred or paid during the basis period for that year to a statutory reserve fund or to any educational institution or co-operative organisation established for the furtherance of co-operative principles, or to both, or to a Co-operative Education Trust Fund, as may be required under the provisions of any written law relating to the registration of co-operative societies in Malaysia:
>
> Provided that the maximum sum to be deducted shall not exceed one-fourth of the audited net profits for that basis period of such co-operative society; and
>
> (b) an amount equal to eight per cent (or such percentage as may be prescribed) of the members' funds (as defined in paragraph 12(2) or Part I of Schedule 6) as at the first day of the basis period for the year of assessment.

The order of the Special Commissioners of Income Tax on 1 August 1994 was that by consent of both parties, the deduction under paras (a) and (b) of sub-s. (1) of s. 65A of the Act for the year of assessment 1986 amounting to RM16,347,475 is allowed and the respondent shall not demand that the deduction be brought to the subsequent years of assessment if there is no overall or sufficient income against which a deduction may be made. It also held that the respondent is not exempted from paying income tax for the year of assessment 1986 under the Act but can bring forward any adjusted loss together with capital allowances from previous years irrespective of whether in or out of the period of exemption from income tax under the Act, to determine the amount of chargeable income tax for the subsequent years of assessment including the year of assessment 1986. Accordingly, it held that the notice of assessment for the year of assessment 1986 dated 13 April 1987 be amended to accord with their order.

The respondent is a co-operative society which had been registered on 2 August 1954 under the Co-operative Societies Ordinance 1948. By virtue of sub-para. (ii) of para. (f) of sub-s. (1) of s. 13 of the Income Tax Ordinance 1947 (hereinafter "the Ordinance") its income had been exempted from tax up to the year of assessment 1967. The whole of the Ordinance was repealed by s. 155 of the Act with effect from 1 January 1968.

Thereafter, its income had been exempted from tax for the years of assessment 1968 up to 1976 in line with para. 12 of Schedule 6 to the Act which reads:

> 12. The income of any co-operative society registered under any written law relating to the registration of co-operative societies, if the principal activities of the society consist of -
>
> (a) transactions with its members or other co-operative societies so registered;
>
> (b) marketing the produce or products of its members; or
>
> (c) selling to its members goods purchased for the purpose of being so sold.

In the appeal in the court below, the learned High Court judge held that following the exemption from paying income tax enjoyed by the respondent under the Ordinance, the respondent continued to enjoy the exemption even when the Ordinance was repealed and replaced by the Act by virtue of the transitional provision given by s. 156 of the Act read together with para. 33 of Schedule 9 to the Act.

Section 156 of the Act states that the transitional and saving provisions in Schedule 9 to the Act shall have effect notwithstanding s. 155, which is the repealing section, or any other provision of the Act.

The problem arose in 1986 when the Income Tax (Amendment) Act 1977 (Act A 380) was promulgated and para. 12 of Schedule 6 to the Act was amended to read as follows:

> 12.(1) The income of any co-operative society:
>
> (a) in respect of a period of five years commencing from the date of registration of such co-operative society; and
>
> (b) thereafter where the members' funds of such co-operative society as at the first day of the basis period for the year of assessment is less than five hundred thousand ringgit.

Subparagraph (2) of para. 12 of Schedule 6 to the Act was again amended by the Income Tax (Amendment) Act 1978 (Act A 429) by substituting for the words "shares, subscriptions and entrance fees" the words "shares and subscriptions".

Also, to para. 33 of Schedule 9 to the Act was added, by the Income Tax (Amendment) Act 1980 (Act A 471) which was deemed to have effect for the year of assessment 1968 and subsequent years of assessment, a new para. (a) to the proviso and reproduced below is the said paragraph as amended:

> 33. Any exemption from any previous tax or from any provision of a repealed law shall, if it was made under a repealed law and was effective on 31st December, 1967, be deemed to have been made by an order under section 127 in relation to tax imposed by this Act or in relation to the corresponding provision of this Act, as the case may be:
>
> Provided that this paragraph shall not apply in relation to -
>
> (a) any such exemption for which provision is made, with or without modification, in this Act; or
>
> (b) section 44(3) of the Sarawak Ordinance.

It is because of this amendment that the appellant had issued the notice of assessment dated 13 April 1987 assessing the income tax payable by the respondent at RM1,352,378.44 for the year of assessment 1986.

As to the order made by the Special Commissioners of Income Tax, the respondent had appealed against that part not exempting them from paying income tax for the year of assessment 1986 while the appellant had cross appealed against the other parts of the order relating to the bringing forward of the adjusted losses and capital allowances from previous years of assessment.

The learned High Court judge allowed the respondent's appeal based on the decision of the Supreme Court in *National Land Finance Co-operative Society Ltd. v. Director General of Inland Revenue* [1993] 4 CLJ 339; [1994] 1 MLJ 99 (hereinafter "the NLFCS case") as the proviso withdrawing the exemption is hazy whereas a statutory proviso intending to withdraw an exemption should be stated clearly leaving no room for doubt as to its meaning.

As for the carrying forward of the adjusted losses and capital allowances from previous years of assessment, the learned High Court judge ruled that sub-s. (5) of s. 127 of the Act only specially mentions "income which is exempt from tax" and this does not cover adjusted losses or capital allowances. Accordingly, in view of sub-ss. (2) of both s. 43 and s. 44 of the Act respectively read together with para. (b) of s. 42 and para. 75 of Schedule 3 to the Act, he held that the finding of the Special Commissioners of Income Tax was correct.

The aforesaid provisions are reproduced below for ease of reference:

> 42. Subject to this Act, the statutory income (if any) of a person from a source for a year of assessment shall consist of -
>
> (a) xxx
>
> (b) the amount of -
>
> (i) any balancing charge or the aggregate amount of the balancing charges;
>
> (ii) any agriculture charge or the aggregate amount of the agriculture charges; and
>
> (iii) any forest charge or the aggregate amount of the forest charges,
>
> falling to be made for that year under Schedule 3 in relation to that source,
>
> reduced by the amount of any allowance or the aggregate amount of the allowances falling to be made for that year under that Schedule in relation to that source.

43. (1) xxx

(2) Subject to subsections (3) and (5), there shall be deducted under subsection (1)(a) pursuant to this subsection from the aggregate of the relevant person's statutory income from each of his sources consisting of a business for the relevant year the amount ascertained under section 44(4) or (5) for any particular year of assessment preceding the relevant year or, where that amount exceeds that aggregate, so much of that amount as is equal to that aggregate:

Provided that, where a deduction has been made or may be made pursuant to this subsection from the aggregate of the relevant person's statutory income from each of his sources consisting of a business for a year of assessment following the particular year in question or for more than one year of assessment following that particular year and in either such case ending prior to the relevant year, then, for the purposes of the application of this subsection for the relevant year, there shall be substituted in place of the amount ascertained under section 44(4) or (5) for that particular year so much, if any, of that amount as has not been deducted for the year of assessment following that particular year or, as the case may be, for those years of assessment following that particular year and ending prior to the relevant year.

(3) xxx

(4) xxx

(5) xxx

(6) xxx.

44. Total income.

(1) xxx

(2) Subject to subsections (3) and (5), there shall be deducted pursuant to this subsection from the aggregate income of the relevant person for the relevant year the amount of any adjusted loss from a source of his for the basis period for the relevant year or, where there is an adjusted loss from each of two or more sources of his for the appropriate basis period for each source for the relevant year, the aggregate of the adjusted loss from each of those sources for its appropriate basis period for the relevant year.

(3) xxx

(4) xxx

(5) xxx

(6) xxx

(7) xxx.

Schedule 3

75. Where, by reason of an insufficiency or absence of adjusted income of a person from a business of his for the basis period for a year of assessment or by reason of the existence of an adjusted loss from the business for that period, effect cannot be given or cannot be given in full to any allowance or to the aggregate amount of any allowances falling to be made to him for that year in relation to the source consisting of that business, that allowance or that aggregate amount, as the case may be, which has not been so made (or so much thereof as has not been so made to him for that year) shall be deemed to be an allowance to be made to him for the first subsequent year or assessment for the basis period for which there is adjusted income from that business, and so on for subsequent years of assessment until the whole amount of the allowance or that aggregate amount to be made to him has been made to him.

We are of the unanimous view that this appeal falls on all fours with the *NLFCS* case *(supra)* where the concluding paragraphs of the landmark judgment state:

There are ample authorities to show that courts have refused to adopt a construction of a taxing Act which would impose liability when doubt exists. In *Re Micklewait* [1855] 11 LJ Ex 452 it was held that a subject was not to be taxed without clear words. We realize that revenue from taxation is essential to enable the Government to administer the country and that the courts should help in the collection of taxes whilst remaining fair to taxpayers. Nevertheless, we should remind ourselves of the principle of strict interpretation as stated by Rowlatt J in *Cape Brandy Syndicate v. Inland Revenue Commissioners* 12 TC 358:

> ... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used ...

It has also been said by the Judicial Committee in *Oriental Bank Corp v. Wright* [1880] 5 App Cas 842 'that the intention to impose a charge upon a subject must be shown by clear and unambiguous language'.

On the retrospective operation of Acts, the presumption is that an enactment is not intended to have a retrospective operation unless a contrary intention appears. In this case, that presumption has been rebutted because s. 1(5) of the Amendment Act states in clear terms that the amendment was

intended to be retrospective. But a retrospective operation should not be given to a statute to impair an existing right and it has been stated by the UK Court of Appeal in *EWP Ltd v. Moore* [1992] 1 All ER 880 at page 891:

> ... that those who have arranged their affairs, as the saying is, in reliance on a decision of these courts which has stood for many years should not find that their plans have been retrospectively upset ...

Moreover, one should avoid a construction that inflicts a detriment and as Lord Brightman has said in *Yew Bon Tew v. Kenderaan Bas Mara* [1983] 1 MLJ 1 [at p. 2]; [1982] 3 All ER 833:

> A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past.

In this case it is clear that the taxpayer had an acquired right to exemption from tax under the Ordinance, when the Act came into force on 20 September 1967. That acquired right which was confirmed by the Special Commissioners of Income Tax in case No PKR 256 should only be overruled prospectively and not retrospectively. Admittedly, the legislature had made its intention clear in s. 1(5) of the Amendment Act that s. 16 therein which amended Sch 9 of the Act shall be deemed to have effect for the year of assessment 1968 and subsequent years of assessment. But the Amendment Act did not also expressly provide that Pt I of the Interpretation Acts 1948 and 1967 which includes the said s. 30 of that Act shall not apply. Therefore, following the decision of Viscount Dilhorne, Lord Diplock and Lord Edmund-Davies in the House of Lords case of *Floor v. Davis (Inspector of Taxes)* [1980] AC 695, [1979] 2 All ER 677, [1979] 2 WLR 830 the provisions of the Act must be construed having regard to the Interpretation Act 1948 and 1967. There is therefore a doubt whether the legislature had intended to impair the existing right of the taxpayer and inflict a detriment to it as it takes away a vested right under the existing law to exemption from tax. As there is a doubt, the ambiguity must be construed in favour of the taxpayer as the said exemption from tax has not been removed by sufficiently clear words to achieve that purpose. We therefore allowed the appeal with costs here and below, set aside the decision of the learned judge and restored the deciding order of the special commissioners that the assessment be discharged. We also ordered that the deposit be refunded to the tax payer.

Accordingly, we hold that the learned High Court judge had made the correct decision. The appeal is dismissed with costs and the deposit is to go to the respondent to account of their taxed costs.